86-834

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NEW JERSEY DISTRICT COURT ASSOC. INC., JACK SPAETH, SR., JACK SPAETH, JR., R. EUGENE GLAB, SHARON L. CHERNIN AND WAYNE VANDERHOOF

Plaintiffs-Appellants,

—v.—

NEW JERSEY SUPREME COURT, AND ROBERT D. LIPSCHER, Administrative Director of the Courts

Defendants-Respondents,

PETITION FOR A WRIT OF *CERTIORARI* TO THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY

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Appellants respectfully petition for a writ of certiorari to review the judgment in the case of the Appeliate Division of the Superior Court of New Jersey.

QUESTIONS PRESENTED

1. Whether rules by a state's highest court, providing for service of process by mail, facially violate the Fourteenth Amendment of the United States Constitution.

2. Whether Appellants' due process rights under the Fourteenth Amendment of the United States Constitution were violated by the lower Court's failure to follow the Legislative Mandate requiring personal delivery of process.

3. Whether the decision below, without a hearing on the merits, deprived Appellants of their Fourteenth Amendment rights under the United States Constitution.

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OPINIONS BELOW

The denial of certification by the New Jersey Supreme Court (App. at 3a, 4a) is not yet reported. The per curiam affirmance by the Appellate Division (App. at 5a, 6a) is not yet reported. The opinion of the Superior Court, Law Division (App. at 9a-19a) is reported at 205 N.J. Super. 582, 501 A.2d 596 (1985).

JURISDICTION

The judgment of the New Jersey Supreme Court was entered on May 15, 1986. By order dated August 6, 1986, Justice Brennan extended the time within which to file a petition for writ of certiorari to and including October 12, 1986. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(2) and 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment provides in pertinent part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE FACTS AND PROCEEDINGS

This action, which sought to enjoin respondents from implementing service of process by mail, was commenced in the Law Division of the Superior Court of New Jersey, Bergen County, on April 19, 1985 (App. 10a).

The named plaintiffs, appellants herein, are an organization and five individuals. The plaintiff organization, the New Jersey District Court Association, Inc., is a statewide organization comprised of a majority of process servers in the Special Civil Part (App. 17a). Three of the individual appellants, Spaeth, Spaeth, Jr., and Glab, are members of the appellant organization who served as District Court officers in Monmouth County, and were terminated as a direct result of the Respondents' mail service project in Monmouth County (App. 17a). The remaining individual appellants, Sharon L. Chernin and Wayne Vanderhoof, were litigants in the Division of Small Claims, Special Civil Part of the Superior Court, Law Division, Monmouth County (App. 23a-27a). A default judgment was entered against Vanderhoof after ineffective service of complaint upon him by mail (App. 25a, 26a).[1] Chernin, a plaintiff in an action brought in the same Court and County, was inconvenienced and incurred extra expense as a result of an ineffective mail service upon the defendant (App. 24a, 25a).

Each of the plaintiffs sought to prohibit the Director of the Administrative Office of the New Jersey Courts from implementing service of process by mail in the Special Civil Part in accordance with orders of the Supreme Court, dated January 4, 1985, and

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[1]The opinion of the Superior Court, Law Division, Bergen County made no reference to Appellants Chernin or Vanderhoof. Accordingly App. 23a-27a, included by the Respondent in its Appendix submitted to the Superior Court of New Jersey Appellate Division, is by necessity included in Appellants' Appendix.

February 20, 1985 (App. 20a, 22a). The two orders[2] provided that service by simultaneous certified and regular mail by the Clerk of the Special Civil Part (App. 20a) had the same effect as personal service (App. 20a) and that default judgments could be entered where a defendant failed to appear (App. 20a).

On June 5, 1985, the Superior Court of New Jersey, Law Division, Bergen County held that under New Jersey decisional law the two orders were controlling as they conflict, or appear to conflict with N.J.S.A. 2A:18-5[3] which provides for personal service. That Court also held that the two orders providing for service by mail did not exceed the New Jersey Supreme Court's rulemaking powers (App. 11a-13a) and did not violate state or federal constitutional guarantees of due process (App. 14a-16a) or deprive any of the plaintiffs of property interests without due process of the law (App. 17a-19a). Accordingly, on June 25, 1985, that Court granted Respondents' motion for summary judgment and entered a judgment in favor of the Respondents on all claims in the Plaintiffs-Appellants' complaint (App. 7a, 8a). The Superior Court's order of June 25 was affirmed on January 2, 1986, by the Superior Court of New Jersey, Appellate Division (App. 5a, 6a). On May 12, 1986, the Appellant's Petition for Certification to the New Jersey Supreme Court was denied with costs (App. 3a, 4a) and dismissed pursuant to R. 2:12-9 of the Rules of Court (App. 1a, 2a).

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[2]The orders of January 4, 1985 and February 20, 1985 were also not described in the opinion or orders of the Superior Court. Accordingly App. 20a-22a, included by the Respondents in its Appendix submitted to the Appellate Division, is by necessity included in Appellants' Appendix.

[3]N.J.S.A. 2A:18-5 provides that:

All process issued out of a county district court shall be served only by the sergeant at arms of the court or such officer as shall be especially designated by the judge or in courts having branch parts, the presiding judge of the Court.

(App. 11a, 14a).

REASONS FOR GRANTING THE WRIT

This case presents the question of whether the decision below erred in granting Respondents' summary judgment motion. The rules of the New Jersey Supreme Court providing for service by mail are facially violative of the Fourteenth Amendment of the United States Constitution. It also presents the question of whether the decision below deprived appellants of their Fourteenth Amendment rights under the United States Constitution because the Court failed to follow the New Jersey Statute requiring personal delivery of process. Finally, this case presents the question of whether the decision below granting Respondents' summary judgment motion, without a hearing on the merits, deprived Appellants of their Fourteenth Amendment rights under the United States Constitution.

I.

THE DECISION BELOW ERRED IN GRANTING RESPONDENTS' SUMMARY JUDGMENT MOTION. THE NEW JERSEY SUPREME COURT ORDERS OF JANUARY 4, 1985 AND FEBRUARY 20, 1985, ARE FACIALLY VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

In McDonald v. Mabee, 243 U.S. 90 (1917), this Court acknowledged that personal service is not always necessary. Thereafter in Hess v. Pawloski, 274 U.S. 352 (1927), the Court recognized for the first time that service by registered mail, in place of personal service, may satisfy the requirements of due process. Nonetheless, one year later, in Wuchter v. Pizzutti, 276 U.S. 13 (1928), this Court held that a statute, providing for service of process on non-residents of the State of New Jersey for injury caused by the negligent operation of automobiles on its highways, was unconstitutional on its face. The Court concluded that the

statute, which authorized service of process on non-resident motorists by making the New Jersey Secretary of State the person to receive the process, was invalid under the Fourteenth Amendment because it guaranteed no "reasonable probability that if . . . complied with, the defendant will receive actual notice." (Id. at 24). The Court pointed out that a provision of law for service cannot leave open a clear opportunity for the commission of injustice by depriving a defendant of his property without due process of law (Id. at 19).

Although the mail service orders of the New Jersey Supreme Court provide for service of process by simultaneous certified and regular mail (App. 20a) they do not provide for "feasible and customary alternatives and supplements to the form of notice chosen." Greene v. Lindsey, 456 U.S. 444, 454 (1982), quoting Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 315 (1950) (App. 20, 22a). At the very least, the mail service orders of the New Jersey Supreme Court should include, as do the Federal Rules of Civil Procedure ("FRCP")[4] procedural safeguards to adequately protect a person's due process rights, and provisions to monitor each case commenced by mail service. See Sterling v.

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[4]In 1982, Congress amended the Federal Rules to authorize service by first class mail. See F.R.C.P. 4(c)(C)(ii). When mailed service is used, the defendant must be sent an acknowledgment form and a return envelope, postage prepaid. If no acknowledgment is received, the plaintiff must resort to other means of service. See Lee v. Carlson, No. 85 Civ. 4442 (EW) (S.D.N.Y. 1986); Armco Inc., v. Penrod-Stauffer Building Systems, Inc., 733 F.2nd 1087 (1984); Eden Foods, Inc., v. Eden's Own Products, Inc., 101 F.R.D. 96 (1984).

Environmental Control Board of New York City, 793 F.2d 52 (2d Cir. 1986)[5] This Court has observed several times that service by mail is less than reliable.[6] Furthermore, this Court has usually permitted constructive service by mail only in connection with its striking down of statutes authorizing service by publication.[7]

[5]In Sterling, the Second Circuit Court of Appeals held that Chapter 623 amended by § 1404(d)(2) of the New York City Charter ("nail and mail" service statute) was unconstitutional as applied to absentee landlords. Counsel for the City of new York filed a petition for certiorari with this Court on or about October 6, 1986.

[6]Greene v. Lindsey, 456 U.S. 444, 460 (1982) (O'Connor, J., dissenting); Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983) (O'Connor, J., dissenting).

See also Ortiz v. Engelbrecht, 61 F.R.D. 381, 387 (D.N.J. 1973) (mail handling no longer enjoys its former reputaiton for reliability); Tuerkheimer, Service of Process in New York City: A Proposed End to Unregulated Criminality, 72 Colum. L. Rev. 847, 860 (1972) (commenting on high incidence of mail theft in areas of New York City).

[7]See Mullane v. Central Hanover Bank & Trust, 339 U.S. 306 (1950) (notice by publication alone is not enough when the plaintiff possesses the addresses of the individuals to be served); Covey v. Town of Somers, 351 U.S. 141 (1956) (the Court struck down a New York statute which provided that written notice to any taxpayer, including minors and incompetents, was sufficient for judicial foreclosure of tax liens in all cases); Schroeder v. City of New York, 371 U.S. 208 (1962) (notice pursuant to the New York City Water Supply Act providing for publication as well as posting did not measure up to the requirements of due process); Walker v. City of Hutchinson, 352 U.S. 112 (1962) (notice by publication does not satisfy due process); Greene v. Lindsey, 456 U.S. 444 (1982) (posted notice does not satisfy due process where mail is available to enhance the reliability of an otherwise unreliable notice procedure); Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798 (1983) ("constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service.").

Due process requires that a defendant be afforded an opportunity to be heard. Grannis v. Ordean, 234 U.S. 385, 394 (1914). In Mullane v. Central Hanover Bank & Trust Company, 339, U.S. 306 (1950), this Court stated that the "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." (Id. at 314). This Court also declared a general standard for notice:

> An elementary and fundamental requirement of due process in any proceeding, which is to be accorded finality is notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . The notice must be of such a nature as to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance. . . . The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.

(Id. at 314-15). In applying this standard, the Court adopted an analytical approach that balanced the need to assure notification of those who would be affected in a case against the practical difficulties associated with notifying an interested party. The focus in this type of an analysis is on the "character of the proceeding and the nature of the interests" involved (Id. at 317). Here, the mail service scheme ordered by the Respondents forecloses any inquiry into the character of the proceedings since the orders of the New Jersey Supreme Court apply to any civil case in the Superior Court of New Jersey, Law Division, Special Civil Part, for thirteen counties and twenty-one municipalities (App. 20a, 22a). Clearly, the Respondents' scheme does not comply with the general rule of law

permitting service by mail only for specifically designated types of actions.[8] For example, in Camden County, service by mail applies to civil, landlord-tenant, and small claims cases for defendants located in Camden and Cherry Hill, while in Hudson County service by mail applies to "randomly selected" civil and small claims cases for defendants located in Jersey City and in all other Hudson County municipalities (App. 20a).

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[8]See United States v. Bolton, 781 F.2d 528 (6th Cir. 1985) (approving Surface Mining Control and Reclamation Act which provides that tender of certified mail will constitute "actual notice" to individuals who violated the Act); In re Penn Central Transportation Company, 771 F.2d 762 (3d Cir. 1985) (creditors, who received notice of proof of claims by mail, received the notice they were due under the Constitution); Lewis v. City of St. Louis, 607 F. Supp. 614 (D.C. Mo. 1985) (court upheld ordinance which allowed for Building Commissioner to serve owner of defective building by delivery to owner, by mailing, or by publication); Lowenstein & Sons, Inc. v. Superior Court, 145 Cal. Rptr. 814, 80 Cal. App. 3d 762 (1978) (statute provided option permitting service of foreign corporation by mail even though foreign corporation had a designated agent within state).

Also, the small number of courts which have adopted rules providing for service of process by mail have restricted the subject matter of such rules just as legislatures have restricted the subject matter of statutes providing for service by mail. See Park Nursing Center, Inc., v. Creditors Committee of Park Nursing Center, 766 F.2d 262 (6th Cir. 1985) (bankruptcy rule permitting service of process by first class mail does not violate due process); Reigh v. Schleigh, 595 F. Supp. 1535 (D. Md. 1984) (in post judgment garnishment procedures, the Maryland District Rule requiring judgment debtor be mailed copy of writ of attachment promptly after service upon garnishee satisfies due process). Courts faced with general cases not falling under a statute or court rule have supported flexible standards. See Sheiner v. City of New York, 611 F. Supp. 172 (D.C.N.Y. 1985) (service of notice and order describing unsafe property should be personally served on addressee, and if that person cannot be found within city and personal service cannot be made, notice and order must be posted and a copy mailed to addressee's last known place of residence); Coughlin v. Regan, 584 F. Supp. 697 (D. Maine 1984) (nature of notice depends upon circumstances surrounding the particular conduct and must reflect an accommodation of the competing interests involved); Harris v. Gaul, 572 F. Supp. 1554 (N.D. Ohio 1983) (holder of property interest must be given actual notice of a pending tax sale rather than notice by publication and concurrent mailing, unless the interest is less substantial or is not reasonably identifiable, then constructive notice will satisfy due process).

The trial court failed to apply the Mullane standard. It did not balance the interests of parties interested in receiving notice with the practical difficulties of notifying them. The fact that compliance with N.J.S.A. 2A:18-5 involved a financial burden on the state, which may be lessened with service by mail[9] is not a rational basis for dispensing with personal service provided for by the New Jersey legislature. Similarly, basic problems such as incorrect addresses, clerical mishaps and multiple mailing

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[9]Service by mail may be less expensive than personal service; however, mail service is more expensive the closer to the courthouse the defendant is located. See Special Civil Part Subcommittee Report on Service by Mail, New Jersey Law Journal, Sept. 4, 1986, p.1 [hereinafter Special Report]. In addition, common sense indicates that when invalid default judgments are obtained through service by mail, additional costs are incurred. See Special Report, supra at p.18, where the committee concludes that "Cumulatively, the percentage of default for all complaints by mail (70%) was slightly greater than that for all complaints served either personally or by mail (66%)."

addresses cut against providing the constitutionally mandated notice contemplated by making service by mail.[10]

This Court should decide that the orders of the New Jersey Supreme Court providing for service by mail are unconstitutional on their face.

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[10]See Greenbaum, The Postman Never Rings Twice: The Constitutionality of Service of Process by Posting After Greene v. Lindsey, 33 Am. U.L. Rev. 559. 624-25, n. 142-53. Professor Greenbaum carefully noted the problems implicit with service by mail. In addition, he sets forth some of Postmaster General William F. Bolger's comments on the reliability of the postal service:

> Changes have taken place with modernization, but I wouldn't pretend to anybody that we give better service than we did back in the 1930's or 1950's.
>
> One of the penalties you suffer with modernization is that when an error is made, it's hard to detect. In the old days, when we had 86 billion pieces of mail a year and 741, 000 employees, a piece of mail might be handled five times. As many, if not more, errors were made, but they were detected.

An Interview With Post Master General William F. Bolger, A. Mgmt. June 1983, at 63, 69.

See also Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983) where the Court stated that notice simply addressed to "Mennonite Board of Missions, Wayne County, Ohio" likely would have provided the Board of Missions actual notice of the tax sale at issue there. (Id. at 798 n.4.) Ironically, counsel for the appellee did so address a letter, which was returned marked "insufficient address" (Letter from Robert W. Miller, Counsel for the Appellee, to Arthur F. Greenbaum (July 11, 1983)).

II

APPELLANTS' DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION WERE VIOLATED BY THE LOWER COURT'S FAILURE TO FOLLOW THE LEGISLATIVE MANDATE REQUIRING PERSONAL DELIVERY OF PROCESS

The decision below erred in granting Respondents' summary judgment motion on the ground that the orders providing for mail service did not supersede a conflicting New Jersey statute, providing for personal service. This holding was based on an erroneous interpretation of New Jersey decisional law and therefore, deprived appellants of their due process rights under the Fourteenth Amendment.[11]

First, the lower court relied on Winberry v. Salisbury, 5 N.J. 240 (1950), cert. denied, 340 U.S. 877, for the proposition that the mail service orders superseded conflicting state legislation. The Winberry court observed that the "subject to law" requirement of Article VI, § 2, para. 3 of the New Jersey Constitution did not mean "subject to legislation" (App. 14a); the lower court erred by viewing this language as a general rule of law instead of merely dicta. Crocker v. First Hudson Associates, 569 F. Supp. 97, 103 (D.C.N.J. 1982). Furthermore, reliance on the not "subject to legislation"

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[11]See Swisher v. Brady, 438 U.S. 204, 215 n. 13 (1977), where this Court stated that:

> The District Court noted that Rule 911 differs from § 3-813, see supra, at 210-211, but concluded that under Maryland decisional law the Rule governs. 436 F. Supp., at 1365. The parties do not dispute the District Court's reading of state law. Accordingly, like the District Court, we consider only Rule 911 in resolving the constitutional challenge.

See also, Accardi v. Shaughnessy, 347 U.S. 260 (1954).

interpretation in Winberry as a rule of law has been discredited by many prominent commentators.[12] Second, although the lower court correctly held that Winberry and its progeny stand for the proposition that ". . . [the courts] are not to make substantive law wholesale through the exercise of the rule-making power"

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[12]See Kaplan and Green, The Legislature's Relation to Judicial Rule-Making: An appraisal of Winberry v. Salisbury, 65 Harvard L. Rev. 234, 242 (1951); Weinstein, Reform of Federal Court Rulemaking Procedures, 76 Colum. L. Rev. 905, 923 (1976); Lynch, The New Jersey Supreme Court and the Counsel Fees Rule: Procedure or Substance and Remedy?, 4 Seton Hall L. Rev. 19, 26-27 (1972). See also, Martin, Inherent Judicial Power: Flexibility Congress Did Not Write into the Federal Rules of Evidence, 57 Texas L. Rev. 167, 176 (1979) ("arguments made a half century ago that procedural rulemaking was on the one hand, a nondelegable legislative function, or on the other, an inherently and exclusively judicial function [as in Winberry], are no longer credible."); Comment, An Inevitable Clash of Power? Determining the Proper Role of the Legislature in the Administration of Justice, 22 South Dakota L. Rev. 387, 403 (1977) ("the dissent points out that the majority ignored the report of the Judicial Committee of the Constitutional Convention which indicated that indeed power was being given by the provision to the legislature to override the court rules."); Comment, The Effect of the New Jersey Supreme Court's Service Rule on the Competence of the County District Courts and the Enforceability of Default Judgments, 7 Seton Hall L. Rev. 340, 357-58 (1976) ("The only restriction upon its rule-making power that the court has recognized is that such power is limited to matters of practice and procedure. Since there is no clear line of demarcation between the substantive law and procedural law . . . it is difficult to predict the limits of the Court's rule-making power.") Note, The Rule-Making Power: Subject to Law?, 5 Rutgers L. Rev. 376, 382 (1953) (The trend of the majority opinion in Winberry v. Salisbury is that the Supreme Court has not made itself the final, but rather the exclusive, power over procedure and rules of procedure. This leads to the conclusion that any attempt on the part of the legislature to pass laws dealing with procedure would be held unconstitutional, whether in conflict with a Supreme Court rule or not.")

See, Gerhart, Arthur T. Vanderbilt: The Compleat Counsellor 244 (1981) ("Many lawyers in New Jersey . . . believed that Vanderbilt, having been defeated in the Constitutional Convention on specifically providing in the new Constitution that the Supreme Court should be vested with final rule-making power, had here re-interpreted the new Constitution to mean the very thing its framers intended it should not mean.").

(App. 13a), it misconstrued state decisional law by holding that N.J.S.A. 2A:18-5 was procedural rather than substantive.[13]

This Court should determine that the New Jersey courts erroneously interpreted state decisional law and thereby violated Appellants' due process rights.

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[13]See Conford, The Jurisprudence of Justice Mountain, 10 Seton Hall L. Rev. 35 (1979), where Judge Conford describes the strenuous years Justice Mountain stood as a dissenter on the New Jersey Supreme Court in cases where judicial remedies were extended to enforce judicial declarations of substantive rights and procedures. These cases include Robinson v. Cahill, 69 N.J. 133, 174-84, 351 A. 2d 713, 735-40 (1975) (Mountain & Clifford, J.J. dissenting); Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 371 A.2d 1192, 12263-67 (1977) (Mountain, J., concurring in part, dissenting in part).

III

THE INDIVIDUAL PLAINTIFF PROCESS SERVERS AND ALL OF THE MEMBERS OF THE APPELLANT ASSOCIATION HAVE A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST THAT HAS ERRONEOUSLY BEEN TERMINATED BY THE DECISION BELOW WITHOUT A HEARING ON THE MERITS

The New Jersey Supreme Court's service by mail orders do not satisfy the due process requirements of the Fourteenth Amendment because they deprived the individual plaintiffs of a property interest without due process of law. Board of Regents v. Roth, 408 U.S. 564, 569 (1972).

While the meaning that has been applied to the word "property" is not limitless, it is quite broad. In Roth, the Court stated that property interests are created and defined by existing rules or understandings that stem from an independent source. Id. at 577. N.J.A.C. 4:1-8.14(b), which outlines the provisions under which process servers are employed, states that a person can be removed from employment for the causes enumerated or because of "sufficient reasons as determined by the Civil Service Commission." Here, the lower courts interpreted N.J.A.C. 4:1-8.14(b)(6) to mean that as long as termination does not preclude a public employee from future public employment there is no need to provide the employee with an opportunity for a hearing. However, such an interpretation contravenes the Supreme Court's decision in Schware v. Board of Bar Examiners, 353 U.S. 232 (1957). In Schware, the Court stated that "a State, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities" without a full prior hearing. Id. at 238. Thus, the concept of "liberty" in the Fourteenth Amendment context includes the liberty to follow a trade, profession, or other calling. If a state

excludes a person from a trade or calling, it is depriving him of liberty, which it may not do without due process of law.

Having a property interest in continued employment is not limited to situations where employment is held under a formal contract. In Connell v. Higginbotham, 403 U.S. 207 (1971), teachers who had been hired without tenure or formal contract were dismissed from their positions without a hearing. The Court held that the teachers were denied due process because there was an implied promise of continued employment. In Perry v. Sinderman, 408 U.S. 593 (1972), the Court stated that if an untenured plaintiff-teacher could prove that the college from which he was dismissed had a de facto policy against dismissal without a hearing arising from rules and understandings officially promulgated and fostered by the college, then his dismissal in the absence of a hearing would constitute an unconstitutional deprivation of a property interest. In the instant case, the individual plaintiffs had more than a unilateral expectation in their continued employment. Under R. 1:33-4, the employment of process servers in New Jersey is delineated by the minimum standards and conditions promulgated by the Administrative Director. These standards do not alter the plaintiffs' legitimate claim to their employment. Due process seeks to "protect those claims upon which people rely in their daily lives." Roth, 564 U.S. at 577.

This Court should determine that the decision below, granting Respondents' summary judgment motion, without a hearing on the merits, arbitrarily deprived Appellants of their property interests under the Fourteenth Amendment of the United States Constitution.

CONCLUSION

For the reasons stated herein, a writ of certiorari should be issued in this case.

Respectfully submitted,

CHASE & CHASE, ESQS.
(Counsel of Record)
1 Atlantic Street
Hackensack, N.J. 07601
(201) 343-6555

By: _____
SEYMOUR CHASE
Attorney at Law
State of New Jersey
Admitted to the Bar of the
Supreme Court of the United
States of America on
October 16, 1978; and

By: _____
BRUCE EVAN CHASE
Attorney at Law
State of New Jersey
Admitted to the Bar of the
Supreme Court of the United
States of America on
December 12, 1983

Jay C. Carlisle, Esq.
Pace University School of Law
78 North Broadway
White Plains, N.Y. 10603
Of Counsel

Counsel gratefully acknowledges the assistance of Bruce M. Stern and Gail A. Matthews in the preparation of this petition.

APPENDIX

SUPREME COURT OF NEW JERSEY
25,088 SEPTEMBER TERM 1985

NEW JERSEY DISTRICT COURT ASSOC., INC., et al,

Plaintiffs-Appellants,

vs.

NEW JERSEY SUPREME COURT, et al,

Defendants-Respondents.

ORDER DISMISSING APPEAL

This matter having been duly presented to the Court, it is ORDERED that the appeal in the within matter is dismissed pursuant to R.2:12-9.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 12th day of May, 1986.

FILED
SUPREME COURT
MAY 15, 1986

Stephen W. Townsend
02 Clerk

Stephen W. Townsend
Clerk

A TRUE COPY
Stephen W. Townsend
CLERK

SUPREME COURT OF NEW JERSEY
C-726 SEPTEMBER TERM 1985

25,088

NEW JERSEY DISTRICT COURT ASSOC., INC., et al,

Plaintiffs-Petitioners,

vs.

ON PETITION FOR CERTIFICATION

NEW JERSEY SUPREME COURT, et al,

Defendants-Respondents.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-5132-84T5 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 12th day of May, 1986.

FILED
SUPREME COURT

MAY 15, 1986

Stephen W. Townsend
02 Clerk

Stephen W. Townsend
CLERK OF THE SUPREME COURT

A TRUE COPY
Stephen W. Townsend
CLERK

NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW
JERSEY
APPELLATE DIVISION
A-5132-84T5

NEW JERSEY DISTRICT
COURT ASSOC. INC., et als.,

Plaintiffs-Appellants,

v.

NEW JERSEY SUPREME
COURT, et al.

Defendants-Respondents.

ORIGINAL FILED
JAN 2 1986
ELIZABETH McLAUGHLIN
Clerk

Argued December 10, 1985 — Decided JAN 2 1986

Before Judges Antell, Shebell and Muir.

On appeal from Superior Court, Law Division, Bergen County.

Bruce Evan Chase argued the cause for appellants (Chase and Chase, attorneys; Mr. Chase on the brief).

Joseph L. Yannotti, Deputy Attorney General, argued the cause for respondents (Irwin I. Kimmelman, Attorney General of new Jersey, attorney; Andrea Silkowitz, Deputy Attorney General, of counsel, and Mr. Yannotti, on the brief).

PER CURIAM

The order for summary judgment dated June 25, 1985 is affirmed substantially for the reasons stated by Judge Ciolino in his formal written opinion of June 5, 1985 for the Law Division.

I hereby certify that the foregoing is a true copy of the original on file in my office.

Elizabeth McLaughlin

Clerk

IRWIN I. KIMMELMAN
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Defendants
New Jersey Supreme Court
and Robert D. Lipscher

by: Joseph L. Yannotti
Deputy Attorney General
Division of Law — Rm. 335
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Newark, New Jersey 07102
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RECEIVED
JUN 26, 1985
DIVISION OF LAW

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-BERGEN COUNTY
DOCKET NO. L-36201-85

NEW JERSEY DISTRICT COURT ASSOC., INC., JACK SPAETH, SR., JACK SPAETH, JR., R. EUGENE GLAB, SHARON L. CHERNIN, and WAYNE VANDERHOOF,

Plaintiffs,

v.

NEW JERSEY SUPREME COURT and ROBERT D. LIPSCHER, Administrative Director of the Courts

Defendants.

Civil Action

ORDER GRANTING SUMMARY JUDGMENT

This matter having been opened to the court by the Attorney General of New Jersey, attorney for the defendants New Jersey Supreme Court and Robert D. Lipscher, on an application pursuant to R. 4:46-2 for an order granting summary judgment in favor of the defendants on all claims stated in the plaintiffs' complaint since there is no genuine issue as to any material fact and the defendants are entitled to judgment as a matter of law, with Joseph L. Yannotti, Deputy Attorney General, appearing for the defendants and Seymour Chase, Esq., Chase and Chase, Esqs., appearing for the plaintiffs; and

The Court having considered the pleadings, all the papers filed in support and in opposition to the motion for summary judgment, and the argument of counsel; and

The Court having issued an opinion dated June 5, 1985, finding that no genuine issue of material fact exists and that defendants are entitled to judgment as a matter of law

NOW THEREFORE

It is on this 25th day of June 1985

ORDERED and ADJUDGED that, for the reasons stated in the opinion of the Court dated June 5, 1985, judgment shall be and hereby is entered in favor of the defendants on all claims stated in the plaintiffs' complaint.

ORDERED — THAT A COPY OF THIS ORDER
IS TO BE SERVED UPON ALL COUNSEL
WITHIN 7 DAYS OF THE DATE HEREOF.

Peter Ciolino, A.J.S.C.

NOT FOR PUBLICATION
WITHOUT THE APPROVAL OF
THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, BERGEN COUNTY
DOCKET NO. L-36201-85

NEW JERSEY DISTRICT COURT ASSOC., INC., JACK SPAETH, SR., JACK SPAETH, JR., R. EUGENE GLAB, SHARON L. CHERNIN, and WAYNE VANDERHOOF,

Plaintiffs,

-vs-

NEW JERSEY SUPREME COURT and ROBERT D. LIPSCHER, Administrative Director of the Courts

Defendants.

Decided: June 5, 1986

Chase & Chase, Esqs.,
Attorneys for Plaintiffs
Seymour Chase appearing

Irwin I. Kimmelman, Attorney General of New Jersey
Attorney for Defendants
Joseph L. Yannotti, D.A.G., appearing

On April 19, 1985, plaintiffs commenced this action by filing an Order to Show Cause and Verified Complaint seeking to enjoin the New Jersey Supreme Court and the Director of the Administrative Office of the Courts from implementing service of process by mail in the Special Civil Part in accordance with orders of the Supreme Court dated January 4, 1985, and February 20, 1985. Following oral argument, the Court signed the Order to Show Cause, but denied injunctive relief. Plaintiffs' appeal of that denial was likewise rejected by the Appellate Division on April 22, 1985. The plaintiffs challenge the service by mail program alleging that it exceeds the Supreme Court's rule-making powers and violates both state and federal constitutional gurantees of due process.

On the return day of the Order to Show Cause, defendants moved for summary judgment alleging that the issues presented are legal in nature and that no genuine issue of material fact exists.

> [I]t is the movant's burden to exclude any reasonable doubt as to the existence of any genuine issue of material fact. . . . All inferences of doubt are drawn against the movant in favor of the opponent of the motion. the papers supporting the motion are closely scrutinized and the opposing papers indulgently treated. . . .
>
> [I]f the opposing party offers no affidavits or material in opposition, or only facts which are immaterial or of insubstantial nature, a mere scintilla [citations omitted] he will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts in the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact.

Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74-75 (1954).

The Court agrees with the defendants' position that the questions presented herein are inherently legal. When certain facts

are necessary to support a legal conclusion they are uncontroverted. This case is, therefore, ripe for summary judgment.

I. SUPREME COURT'S POWER TO REGULATE SERVICE OF PROCESS

Article VI, Section 2, Paragraph 3 of the New Jersey Constitution (1947), granting plenary power to the Supreme Court to administer the courts by fashioning rules of practice and procedure, provides:

> 3. Supreme Court, rules; admission to practice of law; discipline of persons admitted.
>
> The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.

N.J. Const. art. VI, § 2, par. 3.

Relative to the Supreme Court's service by mail orders, this constitutional provision raises three questions. First, what arre the parameters of this constitutional grant? Second, does service by mail come within the Court's rule-making province? Third, if there is a conflict between this constitutional provision as it pertains to service by mail and N.J.S.A. 2A:18-5[1], how is it resolved?

A. The Scope of Article VI, Section 2, Paragraph 3.

The issue in Winberry v. Salisbury, 5 N.J. 240 (1950), cert. denied, 340 U.S. 877 (1950), concerned a conflict between a statute and a court rule. The court rule limited the time allowed for taking an appeal to 45 days, while the conflicting statute permitted an appeal,

---

[1]N.J.S.A. 2A:18-5 provides: All process issued out of a county district court shall be served only by the sergeant at arms of the court or such officer as shall be especially designated by the judge or in courts having branch parts, the presiding judge of the court

to be taken within one year. The Winberry Court held that, "the rule-making power of the Supreme Court is not subject to overriding legislation, but that it is confined to practice, procedure and administration as such." Id. at 255.

In construing its rule-making authority, the Court made the following evaluation:

> Article VI, Section II, paragraph 3 of the new Constitution not only gives the Supreme Court the rule-making power, but it imposes on the Supreme Court an active responsibility for making such rules — "The Supreme Court shall make rules." If there were any doubt as to the continuous nature of the rule-making power, such doubt would be resolved by the imposition of the positive obligation on the Supreme Court to make rules for all the Courts.

Id. at 245.

This passage leads to the conclusion that the Supreme Court is not simply permitted to make rules, but is vested with an affirmative duty to promulgate rules and regulations governing the administration of the courts. In re Court Budget and Court Personnel, 81 N.J. 494 (1980) (the Court held that inherent in its rule-making power is the authority to compel the appropriation of funds and personnel necessary for the efficient administration of justice); State v. Leonardis, 73 N.J. 360 (1977) (the Court held that the implementation of the pretrial intervention program is within its rule-making powers); Passaic County Probation Officers Association v. County of Passaic, 73 N.J. 247 (1977) (the Court held that the regulation and superintendence of probation officers is within its rule-making power); Busik v. Levine, 63 N.J. 351, appeal dismissed, 414 U.S. 1106 (1973) (the Court-propounded rule concerning prejudgment interest in tort cases, was held properly within the scope of its rule-making power).

The plain language of the New Jersey Constitution read in conjunction with a survey of the case lwa, leaves no room for doubt regarding the Supreme Court's rule-making authority. The power is plenary in all matters touching practice, procedure and administration of the courts.

B. Procedural Law -vs- Substantive Law

The power to promulgate rules is restricted to the realm of practice and procedure. In Winberry, 5 N.J. at 248, the Court observed:

> The phrase "subject to law" in Article VI, Section II, paragraph 3 of the Constitution thus serves as a continuous reminder that the rule-making power as to practice and procedure must not invade the field of the substantive law as such . . . [The courts] are not to make substantive law wholesale through the exercise of the rule-making power.

The question therefore, is whether the service by mail orders can be characterized as procedural rules or as substantive law? A procedural rule can and often will have an impact or effect upon substantive rights and still be a rule of procedure. See State v. Molnar, 81 N.J. 475, 488 (1980); State v. Leonardis, 73 N.J. at 372-373; Busik v. Levine, 63 N.J. at 364; State v. Linares, 192 N.J. Super. 391, 397 (Law Div. 1983).

As noted above, the Court has fashioned rules creating, affecting, or governing a variety of areas such as pretrial intervention, prejudgment interest, probation officers, medical malpractice panels and court personnel. The service by mail rule does not determine in and of itself the outcome of the proceeding. Service of process is but one step in a series of steps in the ladder to final determination and as such, it is procedural in nature. See Busik, 63 N.J. at 371; Suchit v. Baxt, 176 N.J. Super. 407 (Law Div. 1980). As a final observation, rules for service of process have been historically and indusputably governed by the Supreme Court. See Rules Governing the Courts of the State of New Jersey, R. 4:4; R. 5:4; R. 6:2.

C. *Conflict Between Service By Mail and N.J.S.A. 2A:18-5.*

N.J.S.A. 2A:18-5 provides:

> All process issued out of a county district court shall be served only by the sergeant at arms of the court or such officer as shall be especially designated by the judge or in courts having branch parts, the presiding judge of the court.

While the New Jersey Constitution's grant of power to the Supreme Court over practice and procedure is plenary, it is "subject to law." N.J. Const. Art. VI, § 2, par 3. " '[S]ubject to law' cannot be taken to mean subject to legislation." Winberry, 5 N.J. at 245. Thus, the Court in Winberry concluded that "subject to law" means subject to substantive as distinct from procedural law, Id. at 247, and that the Court's rule-making authority, in the fact of conflict, supercedes overriding legislation. Id. at 255. Passaic County Probation Officers' Association v. County of Passaic, 73 N.J. 247 (1977); George Siegler Company v. Norton, 8 N.J. 374 (1952); Sears, Roebuck and Company v. Katzmann, 137 N.J. Super. 106 (App. Div. 1975); McCoy Co., Inc. v. S.S. "Theomitor III", 133 N.J. Super. 308 (Law Div. 1975).

As stated by Chief Justice Vanderbilt, "[c]omplete power and responsibility in the judiciary are concepts quite inconsistent with the notions of overriding legislation." Winberry, 5 N.J. at 249. Any other construction would render the Court's constitutional power over practice and procedure ephemeral at best, would severely distort the separation of powers concept, and would put at risk the very independence of the judicial branch of government. It is therefore this Court's determination that the service by mail orders are controlling as they conflict, or appear to conflict, with N.J.S.A. 2A:18-5.

II. THE CONSTITUTIONAL ADEQUACY OF SERVICE BY MAIL

The standard for adequacy of notice in terms of satisfying the due process clause of the Fourteenth Amendment is set forth in

Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1956). The Court articulated the litmus test for adequate notice as follows: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Id. at 314. The Mullane Court noted that while personal service is the classic form of notice, it is not mandated by the due process clause. The Court, in rejecting notice by publication, stated:

> The statutory notice[2] to known beneficiaries is inadequate, not because in fact it fails to reach everyone, but because under the circumstances, it is not reasonably calculated to reach those who could easily be informed by other means at hand. However it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication.

Id. at 319. See also Greene v. Lindsey, 456 U.S. 444 (1982).

In O'Connor v. Abraham Atlus, 67 N.J. 127 (1975), Justice Clifford restated the standard outlined in Mullane, and noted that, "[w]ithin that constitutional limitation it is clear that states have the right to forge whatever service of process rules they see fit." Therefore, to withstand constitutional scrutiny, a method of service of process may be employed so long as it is reasonably calculated to inform interested parties of the pending action.

In Township of Montville v. Block 69, Lot 10, 74 N.J. 1 (1977), the issue presented was whether notice by publication in a tax foreclosure action survived constitutional inspection, where the foreclosing municipality could have furnished notice by mail. Justice Pashman, following Mullane, stated: "[W]e hold under both state and federal constitutional guarantees, that where an owner's

---

[2]N.Y. Banking Law § 100(c)(12) provided that after filing a petition for judicial settlement of trust accounts the petitioner "shall" provide notice by newspaper publication.

name and address appear on the municipality's tax rolls, notice must be sent by mail before a taxpayer's right to redeem his property may be foreclosed." Id. at 19-20. See also Schroeder v. New York, 371 U.S. 208 (1962).

Based upon the foregoing discussion of due process no constitutional impediment to service by mail exists, provided there is some reasonable expectation that the notice will be received by the party at the address. This Court is satisfied, predicated upon uncontroverted certifications filed on behalf of defendants, that the service by mail orders pass constitutional muster.

III. TERMINATION OF INDIVIDUAL PLAINTIFF PROCESS SERVERS

The complaint sets forth that plaintiff is a statewide association comprised of a majority of process servers in the special Civil Part. Plaintiffs allege that defendants' service by mail orders "will place the continued employment of many individual members of the plaintiff association in jeopardy due to the virtually complete elimination of the statutory and constitutional requirements for personal service of initial process, which service they effectuated." The three individual plaintiff process servers Messrs. Spaeth, Spaeth, Jr. and Glab were terminated by the Monmouth County Assignment Judge, effective May 1, 1985. Defendants acknowledge that termination of these plaintiffs was a direct result of defendants' expansion of the service by mail project in Monmouth County.

The legal characterization of the three plaintiffs' employment status weighs heavily upon the Court's disposition. The only evidence submitted on this issue is a certification of the Monmouth County Special Civil Part Clerk. That certification establishes that the three process servers were constables (later changed to District Court officers) who served at the pleasure of the Assignment Judge pursuant to R. 1:33-4(e). None of these individuals held a classified position within the Civil Service. They were not on county payroll nor did they receive pension or health care benefits. As to any other members of plaintiff organization, there is nothing in the record concerning their employment status or the effect of service by mail upon their continued employment.

Plaintiffs claim that the challenged orders jeopardize their continued employment, and deprive them of a property interest without due process of law. The seminal case concerning constitutionally protected property interests in Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972). The petitioner, a non-

tenured university professor, was not rehired after the expiration of a one year employment contract. The Court held: "To have a property interest in a benefit, a person must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Id. at 577. The issue of whether a public employee has a legitimate claim of entitlement to continued employment, thereby invoking the due process shield, is addressed i both federal and New Jersey state court opinions. See Detore v. Local 245, Jersey City Public Employees Union, 615 F. 2d 980 (3d Cir. 1980); Mozier v. Board of Education of Cherry Hill, 450 F. Supp. 742 (D.N.J. 1977) (the courts followed Roth finding no cognizable property or liberty interest absent any contractual, statutory or implied right to continued employment).

Nicoletta v. North District Water Supply Commission, 77 N.J. 145 (1978), is distinguishable as it predates the amendment to N.J.A.C. 4:1-8.14(b)(6).[3] Since the amendment to the Administrative Code of October 4, 1978, Tuch v. College of Medicine and Dentistry, 177 N.J. Super. 101 (App. Div. 1980) and Grexa V. State of New Jersey, 168 N.J. Super. 202 (App. Div. 1978) have been reported. In those cases, two managerial level public employees, unprotected by Civil Service classification, statutory tenure or contractual commitment, challenged their terminations as violative of their due process rights. On both occasions, the courts found no cognizable property or liberty interest implicated because of the aforesaid amendment to N.J.A.C. 4:1-8.14(b)(6).

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[3]N.J.A.C. 4:1-8.14(b)(6) was amended to provide that termination can no longer preclude a public employee from future public employment unless that employee was accorded notice and an opportunity to be heard prior to termination.

I find that the process servers involved in this matter, appointed pursuant to R. 1:33-4(e), serve at the will of the Assignment Judge. They have no statutory right to tenure or employment as process servers for any fixed term. No other classification of process server is before the Court.

For the reasons set forth above, summary judgment on behalf of defendants is granted.

Judgment is to be entered in accordance with this opinion with counsel for defendants preparing the necessary order.

It is hereby ORDERED that service by mail projects shall be instituted on or after February 1, 1985 in the Special Civil Part of the Superior Court, Law Division for the following cases in the following counties:

Atlantic — All civil and small claims

Camden — Civil, landlord/tenant, and small claims for defendants located in Camden and Cherry Hill

Cape May — All civil and small claims

Cumberland — All civil and small claims

Gloucester — All civil and small claims

Hudson — Five hundred (500) randomly selected civil and small claims cases for defendants located in Jersey City and five hundred (500) randomly selected civil and small claims cases for defendants located in all other Hudson County municipalities

Hunterdon — All civil and small claims

Mercer — All civil and small claims

Middlesex — All civil and small claims

Ocean — All civil and small claims for defendants located in Dover Township

Passaic — All civil and small claims

Salem — All civil and small claims

Somerset — All civil and small claims

Warren — All civil and small claims

It is further ORDERED that current projects for service by mail in Burlington and Monmouth Counties be continued, and

It is further ORDERED that the Rules of Court pertaining to service of process in the Special Civil Part of the Superior Court, Law Division, shall be relaxed to permit service by simultaneous certified and regular mail by the Clerk of the Special Civil Part; and

It is further ORDERED that service by mail in these cases shall have the same effect as personal service; and

It is further ORDERED that defaults can be entered in those cases where the defendant fails to appear; and

It is further ORDERED that, in place of mileage fees, plaintiffs shall pay $3.00 for each defendant to be served to cover all costs of this service; and

It is further ORDERED that the provisions of this Order shall continue until further Order of the Court.

For the Court,

Robert N. Wilentz
C.J.

DATED: January 4, 1985.

SUPREME COURT OF NEW JERSEY

It is hereby ORDERD that the January 4, 1985 Order of the Supreme Court be amended to include a project for service by mail in the Special Civil Part of the Superior Court, Law Division in Bergen County. This project shall commence on April 1, 1985 and include only civil complaints filed against defendants located in the following municipalities:

Allendale
Cliffside Park
Closter
Demarest
Edgewater
Emerson
Englewood Cliffs
Fair Lawn
Little Ferry
Lodi
Mahwah
Montvale
North Arlington
Paramus
Ridgefield
Ridgefield Park
Rockleigh
South Hackensack
Wallington
Woodcliff Lake

a further ORDERED that all other provisions of the Order of January 4, 1985 shall continue until further order of the court.

For the Court,

C.J.

February 20, 1985

THE OFFICE OF COUNTY CLERK
COUNTY OF MONMOUTH

JANE G. CLAYTON
CLERK
CHARLES V. MEHLER, JR.
CHIEF COURT CLERK

COURT HOUSE
FREEHOLD, N.J. 07728
201 - 431-7069

April 26, 1985

MEMORANDUM

TO: ALVIN YALE MILBERG, ASSIGNMENT JUDGE

FROM: CHARLES MEHLER, CHIEF COURT CLERK

RE: New Jersey District Court Association, Inc., et al.
v. New Jersey Supreme Court and Robert D. Lipscher

Pursuant to your request, I have reviewed the two Small Claim matters which are the subject of court 3 and 4 of the complaint captioned above, and offer the following information:

Sharon L. Chernin v. Donna M. Molok
Docket No. SC-46100-Count 3

This was a suit on a promissory note for the unpaid balance of $450.00.

The complaint was filed on November 14, 1984, and service by both certified and regular mail was made on November 15, 1984 with a returnable date of Novembert 30, 1984. The defendant failed to appear on the return date, and a default was entered. Thereafter, an affidavit of proof was submitted and a judgment was entered by the Clerk of the Court on December 13, 1984.

Unfortunately, the records reveal that on December 7, 1984 the certified mail was returned by the Post Office with a notation "no such address." The regular mail was not returned. Since the information of invalid service wasavailable on December 7, 1984, which was prior to the submission of the affidavit of proof and request for chattel execution, the judgment should not have been entered on December 13, 1984. The Clerk of the Court has indicated that this mistake was made during the time period wherein a backlog existed in one part of the Small Claim section.

In any event, subsequent to the entry of judgment and the issuance of a chattel execution, it was discovered that the service was invalid. As a result, the Clerk of the Court directed an undated letter to the plaintiff Ms. Sharon L. Chernin advising her that the summons had been returned unserved, and that the judgment was vacated. The chattel execution was also recalled.

Thereafter, on January 13, 1985 the plaintiff submitted a reservice fee along with a new address for the defendant. The summons was reissued and directed to the defendant by certified and regular mail on January 18, 1985, returnable on February 8, 1985. Because defendant failed to appear, a default judgment was entered on the return date of February 8, 1985. At plaintiff's request, a chattel execution was issued on February 13, 1985 and a single payment of $200.00 was collected on March 25, 1985.

Comments

It appears that plaintiff Chernin's contention that she was compelled to come to Court a second time was unavoidable despite the internal clerical mistake of entering judgment subsequent to receivin gnotice that the service of process was invalid. The Court's record clearly indicates that the Post Office's notice of improper address was not receiveed by the Clerk of the Court until December 7, 1984. This was eight days subsequent to the return date or eight days after Ms. Chernin had appeared in Court. The Clerk advises that this extraordinary delay in receiving the certified mail return is exceptional and not normally a problem.

Donna Sodon v. Wayne Vanderhoof
Docket No. SC-45528-Count 4

This was a suit on a contract wherein it was alleged that a rebuilt generator was defective and also sold as a new one. The amount of damages claimed was $311.24.

The complaint was filed on September 17, 1984, and service by both certified and regular mail was made on September 20, 1984 with a returnable date of October 5, 1984. The defendant Vanderhoof failed to appear, and a default was entered. Subsequently, an affidavit of proof was submitted and a judgment was entered on October 9, 1984. Thereafter, a chattel execution was issued at plaintiff's request on October 11, 1984. From this

point on, the record is somewhat vague as to the chronological sequence of events. The certified mail was returned by the Post Office with the notation that the address was insufficient for delivery. The returned envelope was not filed stamped as is the usual practice and therefore, the actual date it was received by the Court is not known. The Clerk's Office did mark the case file jacket with the date of no service as October 21, 1984. However, that date was stricken by pen and replaced with the date of September 21, 1984. The September 21, 1984 date appears to be incorrect since i was postmarked in Red Bank on the same date.

In any event, despite the marking of the jacket as a no service, no action was taken to vacate the judgment as required. Not until April 25, 1985 when the contents of Mr. Vanderhoof's complaint were made known, did the Clerk's Office vacate the judgment and recall the execution. It is anticipated that the notice t defendant vacating the judgment and enclosing the refund of the chattel execution fee will be accomplished on this date.

Comments

From the record, it appears that the judgment should not have been entered against Mr. Vanderhoof by the Clerk's Office. Although, it is probable that the notice of no service was received subsequent to entry of judgment, there is insufficient recording dates to substantiate this position. Regardless of the date, the judgment should have been vacated at the time of the recording of no service. The Clerk of the Special Civil Part has indicated that this inaction was clearly a clerical oversight, and not associated with the normal routine of handling service by mail.

I trust you will find this information helpful.

Charles Mehler
Chief Court Clerk

CM/dme
cc: Stella Friscia, Clerk, Special Civil Part
bcc: Jane G. Clayton, County Clerk

Supreme Court, U.S.
FILED
JAN 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-834

In The

Supreme Court of the United States

October Term, 1986

NEW JERSEY DISTRICT COURT ASS'N, INC., JACK SPAETH, SR., JACK SPAETH, JR., R. EUGENE GLAB, SHARON L. CHERIN AND WAYNE VANDERHOOF,

Petitioners,

v.

NEW JERSEY SUPREME COURT and ROBERT D. LIPSCHER, Administrative Director of the Courts,

Respondents.

On Petition for a Writ of Certiorari to the Appellate Division of the Superior Court of New Jersey

BRIEF IN OPPOSITION

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25pp

QUESTIONS PRESENTED

1. Whether rules promulgated by the Supreme Court of New Jersey authorizing the commencement of civil actions by service of process with simultaneous certified and regular mail contravenes the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States?

2. Does the Fourteenth Amendment to the United States Constitution require that individuals be afforded an opportunity to be heard before they are terminated as officers of the courts of New Jersey when the individuals serve at the pleasure of the County Assignment Judge and therefore have no property interest in continued employment under state law?

3. Whether the Supreme Court of the United States has jurisdiction to entertain a claim that a state court erroneously interpreted and applied state constitutional law?

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CONSTITUTIONAL PROVISIONS AND COURT RULES INVOLVED

N.J. Constitution (1947) *Art.* VI, § 2, par. 3

> The Supreme Court shall make rules governing the administration of all courts in the State, and, subject to law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.

N.J. Court Rule 1:33-4 (a) to (e)

> (a) The Assignment Judge shall be the chief judicial officer within the vicinage and shall have plenary responsibility for the administration of the courts therein, subject to the direction of the Chief Justice and by rule of the Supreme Court. He shall be responsible for the implementation and enforcement of the rules, policies and directives of the Supreme Court, the Chief Justice and the Administrative Director.
>
> (b) The Assignment Judge shall be the authorized representative of the Chief Justice for the efficient and economic management of all courts within the vicinage. His responsibilities also shall include all such matters affecting county and municipal governments, including but not limited to budgets, personnel, and facilities.
>
> (c) The Assignment Judge shall be responsible for the supervision and efficient management of all courts matters filed in the vicinage and for the supervision, superintendence and allocation of all judges and personnel having a judicial support function within the vicinage.
>
> (d) The Assignment Judge shall have full responsibility for the administration of all court units within the vicinage, including those of the Surrogate and the Deputy Clerk of the Superior Court.
>
> (e) Subject to uniform minimum standards and conditions promulgated by the Administrative Director,

the Assignment Judge may appoint and discharge such judicial support personnel within the vicinage as he shall deem necessary.

* * *

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COUNTERSTATEMENT OF FACTS

This matter is before the Court on a petition by the New Jersey District Court Association, Inc., Jack Spaeth, Sr., Jack Spaeth, Jr., R. Eugene Glab, Sharon L. Chernin and Wayne Vanderhoof (petitioners), for a writ of certiorari to the Appellate Division of the Superior Court of New Jersey to review the decision entered by that Court on January 2, 1986 affirming a judgment entered in this action in favor of the respondents, Supreme Court of New Jersey and Robert D. Lipscher, Administrative Director of New Jersey's courts, by the Law Division of the Superior Court of New Jersey (Pa5 to Pa6).* In an opinion dated June 5, 1985, the Law Division rejected petitioners' challenge, on state law and federal constitutional grounds, to orders of the Supreme Court of New Jersey authorizing service of process by simultaneous certified and regular mail for certain civil actions commenced in the New Jersey courts (Pa9 to Pa19). The trial court also rejected the assertions of petitioners Jack Spaeth, Sr., Jack Spaeth, Jr., and R. Eugene Glab that the United States Constitution required that they be given an opportunity to be heard prior to their termination as officers of the New Jersey

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* "Pa" refers to the appendix to the Petition for a Writ of Certiorari. "Pb" refers to the brief in support of the Petition.

courts. Final judgment was entered accordingly (Pa7 to Pa8), and the Appellate Division affirmed (Pa5 to Pa6). The Supreme Court of New Jersey refused to certify the matter for review (Pa3 to Pa4), and dismissed the petitioners' appeal (Pa1 to Pa2).

The January 4, 1985 and February 20, 1985 orders of the Supreme Court of New Jersey that are challenged in this case provide for the expanded use of mail service for actions commenced in the Special Civil Part within the Law Division of the Superior Court of New Jersey (Pa20 to Pa22). The Special Civil Part, established in each of the State's 21 counties by order of the New Jersey Supreme Court effective December 31, 1983, exercises the jurisdiction previously exercised by the County District Courts. The County District Courts were statutory courts abolished by an act of the State Legislature enacted in 1983 after the New Jersey voters approved amendments to the State Constitution authorizing the abolition of the County District Courts and the transfer of the jurisdiction of these Courts to the Superior Court. *L.* 1983, *c.* 405. The jurisdiction of the Special Civil Part includes actions where the amount in controversy does not exceed $5,000, landlord/tenant matters and small claims cases. The expanded use of service by mail followed the Supreme Court's consideration of the results of pilot programs conducted since 1981 to test the effectiveness of mail service in the County District Courts, and later, in the Special Civil Part.

In April 1981, the New Jersey Supreme Court authorized the service of initial process by simultaneous certified and regular mail for all civil actions, other than small claims and landlord/tenant matters, in the Passaic County

District Court (Ra2).* The Administrative Office of New Jersey's courts compared the results of the two month project with personal service in the Passaic County District Court during another two month period (Ra20 to Ra 29). It was concluded that service by mail was more effective and could be achieved more quickly than personal service by sergeants-at-arms (Ra27). In March 1982, the Chief Justice of the Supreme Court formed a Task Force on Service of Process in the County District Courts. The Task Force issued a report in which it noted that it had reviewed the "favorable results" of the Passaic County service by mail project and recommended that there be further experimentation with primary mail service in selected counties (Ra40 to Ra70).

In response to the report of the Task Force, the Supreme Court ordered the implementation of experimental service by mail projects in the County District Courts for Burlington and Monmouth Counties. The Burlington County project commenced on January 1, 1983 and summonses in a designated percentage of civil actions, landlord/tenant matters and small claims cases were permitted to be served by simultaneous certified and ordinary mail (Ra30). The Monmouth County project commenced on June 1, 1983 and mail service was permitted for all small claims cases (Ra4).

In December 1983, the Administrative Office of the Courts issued a report on the Burlington project which in-

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* "Ra" refers to the appendix filed by the respondents in the Appellate Division of Superior Court. "Aa" refers to the appendix filed by the petitioners in that Court.

dicated that a greater percentage of defendants in civil actions and in small claims matters were served by mail than by personal service (Ra33). Service by mail was accomplished faster than personal service.* Similar conclusions were reached concerning the Monmouth project. In April 1984, the Clerk of the Special Civil Part reported that service by mail was faster than personal service and a greater percentage of defendants were successfully served by mail than those served personally (Ra37 to Ra 38).

On January 4, 1985, the Supreme Court ordered that service by mail projects be instituted on or after February 1, 1985 in fourteen additional counties with the Burlington and Monmouth County projects continued (Pa20 to Pa21). In an order entered February 20, 1985, the Court amended its January 4, 1985 order to include a service by mail project commencing April 1, 1985 for civil complaints filed in the Special Civil Part in Bergen County against defendants located in 21 municipalities in that county (Pa22). Finally, the Court, by order entered April 19, 1985, amended the January 4, 1985 order to authorize expanded use of service by mail in the Special Civil Part in Monmouth County by allowing its use for civil actions as of May 1, 1985 (Ra18).

At the time the New Jersey Supreme Court entered its order expanding the Monmouth County project to civil

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* The results for personal service and service by mail in landlord/tenant matters were roughly the same both in terms of time to serve and percentage of defendants served (Ra33 to Ra34). Even so, 89% of defendants were successfully served where mail service was employed, and 90% of all defendants served by mail were served within 13 days.

complaints, eleven individuals were authorized to act as Special Civil Part officers in accordance with appointments by the County Assignment Judge pursuant to New Jersey Court Rules. *N.J. Ct. R.* 1:33-4(e) (Aa38 to Aa39). The officers were authorized to serve summonses, execute warrants, make arrests arising out of civil actions, levy attachments and executions and other writs and orders of the court (Aa37 to Aa38). The officers are nonsalaried, full-time employees. They receive fees based upon the performance of specific duties. They are not on the county payroll and receive no pension benefits and no health care benefits. The positions are not classified positions with civil service status under state law. The officers serve at the pleasure of the Assignment Judge (Aa38 to Aa40).

The expansion of service by mail to service for civil actions led to a determination that service income, and other income from prescribed duties, would be reduced and the employment of eleven officers was not warranted. The resulting level of service and other income, when divided among eleven officers, would reduce the total compensation paid to each officer, with the possibility that the Special Civil Part would lose its officers due to insufficient income. The County Assignment Judge decided to terminate the appointments of four officers based on seniority effective May 1, 1985. Three of the four officers, Jack Spaeth, Sr., Jack Spaeth, Jr., and R. Eugene Glab, are petitioners in this matter.

On April 19, 1985, the New Jersey District Court Association, Inc., the three terminated officers and two litigants in the Monmouth County Special Civil Part instituted this action challenging the New Jersey Supreme Court's January 4, 1985 and February 20, 1985 orders. It was alleged that service by mail contravened the Due Process Clause

of the Fourteenth Amendment to the United States Constitution. It was further maintained that enforcement of the orders would deprive the terminated officers of their positions as process servers. This was said to constitute the deprivation of property rights without due process of law. The petitioners also contended that the orders were beyond the New Jersey Supreme Court's rule-making authority under the State Constitution because a state statute was said to mandate personal service for all actions commenced in the Special Civil Part.

In an opinion entered June 5, 1985, the trial court held that service by mail satisfied the requirements of the Due Process Clause of the Fourteenth Amendment (Pa14 to Pa16). The trial court ruled further that the termination of the employment of the Special Civil Part Officers did not contravene the Due Process Clause because the officers had no property right under state law in continued employment (Pa17 to Pa19). The trial court also held that the orders authorizing service by mail were within the New Jersey Supreme Court's plenary authority under the State Constitution to make rules governing the practice and procedure in the New Jersey courts (Pa13 to Pa14).

Judgment was entered by the trial court in favor of the respondents (Pa7 to Pa8). On appeal, the Appellate Division of the Superior Court affirmed substantially for the reasons stated by the trial court in its June 5, 1985 opinion (Pa5 to Pa6). The Supreme Court of New Jersey refused

to entertain an appeal from the judgment of the Appellate Division (Pa1 to Pa4).*

ARGUMENT

POINT I

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE NEW JERSEY SUPERIOR COURT THAT SERVICE BY MAIL DOES NOT CONTRAVENE THE DUE PROCESS CLAUSE IS ENTIRELY IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT AND BECAUSE THERE ARE NO SPECIAL AND IMPORTANT REASONS THAT WOULD WARRANT CONSIDERATION OF THIS ISSUE BY THE COURT.

The Court's rules make plain that review on writ of *certiorari* "is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." *Sup. Ct. R.* 17.1. In support of their application for review, the petitioners maintain that the decision of the New Jersey Appellate Division that service by mail does not violate the Due Process Clause is not in accordance with the decisions of this Court.

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* The petition for a writ of certiorari was initially submitted to the Clerk of this Court on October 14, 1986. It was returned for the correction of certain deficiencies and the corrected version not filed until November 21, 1986. Respondents did not receive the corrected petition until December 24, 1986. This response is filed within 30 days of receipt of the corrected version. *See Sup.Ct. Rule* 22.

Notwithstanding the petitioners' arguments to the contrary, the decision of the New Jersey Superior Court is not in conflict with the applicable determinations of this Court and there are no special and important reasons to justify further review on writ of *certiorari.*

The Court has repeatedly reaffirmed the constitutional adequacy of service by mail. In *Mullane v. Central Hanover Bank and Trust Co.,* 339 *U.S.* 306, 314 (1950), the Court stated that due process requirements are satisfied where the notice procedure employed is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." The Court ruled in *Mullane* that where the names and addresses of individuals affected by a proceeding were known, notice by publication was inadequate. There was no reason "for resort to means less likely than the mails to apprise [interested parties] of the action." *Id.* at 318. This was so because the mails are "recognized as an efficient and inexpensive means of communication." *Id.* at 319.

Similarly in *Greene v. Lindsey,* 456 *U.S.* 444 (1982), the Court held that in forcible entry and detainer actions, posting the summons on the door of the premises was a constitutionally inadequate notice procedure. But the Court emphasized:

> . . . Notice by mail in the circumstances of this case would surely go a long way toward providing the constitutionally required assurance that the State has not allowed its power to be invoked against a person who has not had an opportunity to present a defense despite a continuing interest in the resolution of the controversy. . . . [*Id.* at 455].

And in *Mennonite Bd. of Missions v. Adams*, 462 *U.S.* 791, 800 (1983), where the Court held that notice by publication and posting did not provide a mortgagee of real property with adequate notice of a proceeding to sell the mortgaged property for non-payment of taxes, the Court said that notice by mail "or other means as certain to ensure actual notice" is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interest of any party. *See also Schroeder v. City of New York*, 371 *U.S.* 208, 214 (1962) (In a condemnation action, the City of New York had a constitutional obligation to provide notice, "an obligation which the mailing of a single letter would have discharged."); *Walker v. City of Hutchinson*, 352 *U.S.* 112, 117 (1956) (A letter would have provided constitutionally sufficient notice to a condemnee that his property was about to be taken.); *City of New York v. New York, N.H. and H.R.R.*, 344 *U.S.* 293, 296 (1953) (Mailed notice would be constitutionally adequate for prospective claimants in a railroad reorganization proceeding.)*

The petitioners assert that the New Jersey courts did not apply the *Mullane* standard which petitioners interpret

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* The petitioners cite *Sterling v. Environmental Control Board of New York City*, 793 F.2d 52 (2d Cir. 1986). That case does not support the petitioners. The Court of Appeals held that the City's "nail and mail" procedure for notifying landlords of violations of the City's sanitation code was violative of the Due Process Clause. Mail service was constitutionally inadequate because notices were mailed to buildings where the landlords did not reside. The Court of Appeals made clear, however, that mailed notice would have satisfied the Due Process Clause if the landlords had registered their mailing addresses with the City and if the notices were sent to those addresses.

as requiring the balancing of the need to provide notice with the practical difficulties of doing so (Pb8 to Pb10). While such factors might be relevant to the determination of the constitutional adequacy of a notice procedure, the overriding consideration is the reasonable likelihood that interested parties will be apprised of the pendency of the action by the notice procedure employed. The constitutionality of the notice procedure "must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted." *Greene v. Lindsey, supra,* at 451, quoting from *North Laramie Land Co. v. Hoffman,* 268 *U.S.* 276, 283 (1925).

The courts below correctly applied this principle in concluding, as the Court concluded in *Mullane, Greene* and *Mennonite Bd. of Missions,* that the mails are a means reasonably certain to ensure actual notice to parties whose interests may be affected by a proceeding. The Court's decisions indicate most clearly that the constitutional adequacy of mail service is established as a matter of law. Even were this not the case, the record before the trial court concerning service by mail in the New Jersey Special Civil Part amply supported the conclusion that the mails are reasonably certain to ensure actual notice. In the Passaic Court pilot project over 90% of the defendants were served by mail (Ra24, Ra26). In Burlington County, 87% of the defendants in civil actions, 89% in landlord/tenant matters, and 91% in small claims cases were served by mail (Ra32 to Ra36). In Monmouth County, 98% of the defendants were served by mail (Ra37). Moreover, in none of the three counties was there a marked increase in motions to vacate judgments for lack of service (Ra15). Clearly the New Jersey courts did not err in rejecting the

petitioners' challenge to the New Jersey Supreme Court's orders authorizing service by mail in the Special Civil Part of the Superior Court.

The petitioners suggest that the general rule permits service by mail only for specifically designated types of actions, and that the service of mail program authorized by the Supreme Court of New Jersey for the Special Civil Part could be utilized in a variety of civil cases (Pb8). But whether service by mail is "reasonably calculated under all the circumstances to apprise interested parties of the pendency of an action . . .," *Mullane*, 336 *U.S.* at 314, is not dependent upon the type of action or proceeding in which mail service is employed. Indeed, the Court has never suggested this was so.

The petitioners also maintain that the service by mail program in the Special Civil Part suffers from a constitutional defect because the program allegedly does not have adequate safeguards to protect the due process rights of those affected by the proceedings. The petitioners point to *Fed. R. Civ.P.* 4(c)(ii) as establishing what is said to be constitutionally mandated safeguards (Pb7). The federal rule allows service by first class mail, postage prepaid, and requires resort to personal services unless service is acknowledged on a prescribed form that is returned to the serving party.

The service by mail procedure authorized by the Supreme Court of New Jersey contains safeguards designed to achieve the same goals as the procedures outlined in *Fed. R. Civ.P.* 4(c)(ii). Service is made by regular mail and by certified mail. Signed receipts evidence successful service. Where the receipts are not returned, service may

be deemed effective if the regular mail is not returned. This ensures that an individual may not avoid service by refusing to accept or claim a delivery of certified mail. Finally, the New Jersey court rules prescribe a means of vacating any default judgment that may erroneously be entered by reason of a failure of service. Under New Jersey law, an application to vacate a default judgment is "viewed with great liberality, and every reasonable ground for indulgence is tolerated to the end that a just result is reached." *Marder v. Realty Construction Co.*, 84 *N.J. Super.* 313, 319 (App. Div. 1964), aff'd 43 *N.J.* 508 (1964).

It is clear, therefore, that the service by mail program authorized by the Supreme Court of New Jersey for actions commenced in the State's Special Civil Part does not suffer from any constitutional defect. In so holding, the Appellate Division of the Superior Court correctly applied the governing principles from the applicable decisions of this Court. That being so, there are no special and important reasons for further consideration of this issue by the Court.

POINT II

THE DUE PROCESS CLAUSE DOES NOT REQUIRE THAT PETITIONERS JACK SPAETH, SR., JACK SPAETH, JR., AND R. EUGENE GLAB BE AFFORDED AN OPPORTUNITY TO BE HEARD BEFORE THEIR TERMINATION AS SPECIAL CIVIL PART OFFICERS BECAUSE THESE INDIVIDUALS HAD NO PROPERTY INTEREST UNDER STATE LAW IN CONTINUED EMPLOYMENT.

As stated previously, petitioners Jack Spaeth, Sr., Jack Spaeth, Jr., and R. Eugene Glab were Special Civil Part officers in Monmouth County and were terminated

when the service by mail program was expanded in that county. The County Assignment Judge determined that there would be insufficient income to warrant the employment of eleven officers. Four officers were relieved of their duties on the basis of seniority. The New Jersey court ruled that the dismissals did not violate the Due Process Clause, and no decision of this Court calls for a contrary result in this case. Since the lower courts merely applied the well established principles from this Court's decisions, there are no special and important reasons for the Court to hear the case on writ of *certiorari.*

In *Board of Regents v. Roth,* 408 *U.S.* 564 (1972), the Court stated that the Due Process Clause is a safeguard of the security of interests that a person has acquired in specific benefits. The property interests protected by the United States Constitution from deprivation without due process are those created and defined by rules or understandings that derive from State law. *Id.* at 561. *Accord*: *Bishop v. Wood,* 426 *U.S.* 341, 344 (1976), and *Perry v. Sinderman,* 408 *U.S.* 593, 602 (1972).

The New Jersey courts ruled in this case that the petitioners Jack Spaeth, Sr., Jack Spaeth, Jr. and R. Eugene Glab had no property interest under state law to tenure or employment as officers of the Special Civil Part. Petitioners were employed in non-salaried positions. They received fees prescribed for the performance of specific duties. *N.J. Ct. R.* 6:2-3(a). The positions are not classified positions with status under the state's civil service laws. The petitioners were excluded from participation in pension and health care benefits programs. The petitioners were appointed to their positions by the County As-

signment Judge pursuant to a court rule that allows the Assignment Judge to appoint or discharge personnel as deemed necessary. *N.J. Ct. R.* 1:33-4(e) (Aa38 to Aa40).

Although the petitioners assert that under *N.J. Ct. R.* 1:33-4(e) the process servers employed in the Special Civil Part have more than a unilateral expectation of their continued employment as Special Civil Part officers, this interpretation of the rule was rejected by the state courts. It is not the function of this Court to construe the rule contrary to the construction given to it by the state courts. *Hortonville Joint School Dist. No. 1 v. Hortonville Ed. Ass'n*, 426 *U.S.* 482 (1976); *O'Brien v. Skinner*, 414 *U.S.* 524, 531 (1974). Under the rule, as interpreted by the New Jersey Superior Court, the officers serve at the pleasure of the County Assignment Judge (Pa167). The petitioners took their appointments pursuant to the rule and well knew that they faced dismissal according to its terms.

The petitioners nevertheless argue that they have an interest in continued employment grounded in a state administrative regulation, *N.J.A.C.* 4:1-8.14(b) (Pb15). It is said that this regulation outlines the provisions under which process servers are employed. This is not correct. The regulation governs actions taken with regard to positions in the state's civil service, and the officers of the Special Civil Part do not, as the trial court and the Appellate Division ruled in this case, have positions with status under the state's civil service laws (Pa16). In any event, the administrative regulation provides that individuals could be disqualified from public employment in the state's civil service if the individual had "been dismissed from the public service for delinquency or misconduct after

an opportunity for a hearing." Since the petitioners in this case were *not* dismissed for delinquency or misconduct, the rule has absolutely no application to them.

Wholly aside from the absence of any property interest protected by the Due Process Clause, this case is not one where the petitioners were discharged on individualized charges. Here, the New Jersey Supreme Court chose to implement a service by mail program that reduced the income that had previously supported the employment of eleven officers of the Monmouth County Special Civil Part. The County Assignment Judge determined that unless the staff was reduced, the Special Civil Part could lose all of its officers. Four officers were relieved of their duties on grounds of seniority.

Since the petitioners do not challenge the particular facts concerning the reduction in income or their seniority, it is plain that they are asserting a challenge to the general policy determination of the Supreme Court of New Jersey to expand the service by mail program in Monmouth County. But the protections of the Due Process Clause do not extend to the indirect effects of governmental action. *O'Bannon v. Town Court Nursing Center*, 447 *U.S.* 773, 789 (1980). The protections against deprivation without due process of law do not extend to "consequential injuries resulting from the exercise of lawful power." *Id.*, quoting from *Legal Tender Cases*, 12 Wall. 457, 551 (1871).

The petitioners additionally cite the Court's decision in *Schware v. Board of Bar Examiners*, 353 *U.S.* 232 (1957), for the proposition that a State may not, in regulating eligibility for professional employment, foreclose a range of employment opportunities without a full prior

hearing (Pb15). In *Schware,* the Court ruled that a state could not exclude a person from the practice of law or any other occupation in a manner or for reasons that contravene the Due Process Clause. *Id.* at 328-329. The issue in the case was whether certain qualifications for admission to the bar were rationally related to an individual's fitness or capacity to practice law. *Id.* at 239.

The Court's decision in *Schware* is distinguishable from this matter. This case does not concern the qualifications to serve as officers of the New Jersey Superior Court. Nor does this case involve a situation where individuals have been completely foreclosed from employment opportunities in the New Jersey court system or otherwise. The issue in this matter is whether the petitioners, terminated by seniority as officers of the Special Civil Part due to insufficient workload, were entitled to a hearing prior to termination, where the petitioners had no right or expectation to continued employment under state law. That issue was not considered by the *Schware* Court.

The courts below correctly applied the well established principles from this Court's decisions in rejecting the petitioners' assertions that they could not be terminated without an opportunity for a hearing. As indicated in *Roth,* the property interests protected from deprivation without due process of law are those grounded in state law. Here, the New Jersey courts found that, as a matter of state law, the petitioners had no protected property interest in continued employment. Therefore, the termination of the petitioners without an opportunity for hearing did not contravene the Due Process Clause.

POINT III

THE SUPREME COURT OF THE UNITED STATES DOES NOT HAVE JURISDICTION TO CONSIDER PETITIONERS' CONTENTION THAT THE STATE COURT ERRED IN HOLDING THAT A NEW JERSEY STATUTE DOES NOT REQUIRE PERSONAL SERVICE IN ACTIONS COMMENCED IN THE SPECIAL CIVIL PART.

The petitioners in this case challenged the New Jersey Supreme Court's orders authorizing service by mail on the grounds that state Supreme Court did not have the authority under the New Jersey Constitution to permit the use of mail service in the face of a state statute purportedly requiring personal service. The Appellate Division of the Superior Court affirmed the trial court's finding that the orders were within the Supreme Court's plenary power under the New Jersey Constitution to make rules governing practice and procedure in the state courts. *See N.J. Const.* (1947), *Art.* VI, § 2, par. 3, The Appellate Division also ruled that service of process was a matter of practice and procedure (Pa11 to Pa14). Thus, even if a state statute was in conflict with the Supreme Court's January 20, 1985 and February 4, 1985 orders, the orders superseded the legislation (Pa14). The petitioners seek the issuance of a writ of *certiorari* to determine whether the New Jersey courts "erroneously interpreted state decisional law" in rejecting their statutory challenge to the state Supreme Court's orders (Pb11 to Pb13).

The petitioners argued in the New Jersey courts that *N.J. Stat. Ann.* 2A:18-5 mandates personal service in the

Special Civil Part.* However, the history of the statute reveals that the statute does not and never was intended to address the *manner* of service of a summons. It merely identified those who would undertake service if service was made personally. Even if the statute were read as mandating personal service, it was in conflict with a supervening order by the Supreme Court of New Jersey.

Under the state's Constitution, the Court has plenary authority to make rules governing practice and procedure in the state's courts. *N.J. Const.* (1947), *Art.* VI, § 2, par. 3. It is well established in New Jersey that an order of the Supreme Court overrides any conflicting statute on a matter of practice and procedure. *Winberry v. Salisbury,* 5 *N.J.* 240, 255, 74 *A.*2d 406, 414 *cert.* den. 340 *U.S.* 877 (1950); *George Siegler Co. v. Norton,* 8 *N.J.* 374, 281-381, 86 *A.*2d 8, 12 (1952). It is also established under New Jersey law that service of process is a matter of practice and procedure. *Feuchtbaum v. Constontini,* 59 *N.J.* 167, 280 *A.*2d 161 (1971).

The petitioners have invoked 28 *U.S.C.* § 1257(2) and (3) as grounds for the exercise of jurisdiction in this matter. The petitioners request the Court to consider whether the Appellate Division of the New Jersey Superior Court erred in its interpretation and application of the

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* The statute provides that:

> All process issued out of a county district court shall be served only by the sergeant-at-arms of the court or such officer as shall be especially designated by the judge, or in courts having branch parts, of the court.

The statute was not repealed when the County District Courts were abolished but reference therein to the County District Courts "shall be given effect as though the reference [was] to the Superior Court. . . ." *L.* 1985, *c.* 405, § 4.

state Constitution and the controlling decisions of the New Jersey Supreme Court. However, under 28 *U.S.C.* 1257, the Court is only authorized to review final judgments of state courts by appeal or by writ of *certiorari* where a statute is challenged on the ground that it is repugnant to the Constitution, treaties or laws of the United States. Obviously, the Court's jurisdiction under 28 *U.S.C.* § 1257 does not extend to the consideration of claims that state courts erroneously interpreted state law. *See Brinkerhoff-Faris Trust and Savings Co. v. Hill,* 281 *U.S.* 673, 680 (1930). As the Court has made clear, the construction of state laws is the *exclusive* responsibility of the state courts. *Speiser v. Randall,* 357 *U.S.* 513, 524 n.14, reh. den. 358 *U.S.* 860 (1958). It is not within this Court's authority to consider the state law issue posed in the petition for a writ of *certiorari.* Therefore, the petition for review on writ of *certiorari* should be denied.

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CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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